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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CITY OF LOS ANGELES, a municipal corporation; Plaintiff, v. BEN CAMACHO, STOP LAPD SPYING COALITION and DOES 1-50 inclusive. Defendants.	**CASE NO. 23STCP01060** [Assigned for all purposes to the Honorable Mitchell L. Beckloff, Dept 86] **PLAINTIFF CITY OF LOS ANGELES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR STATUTORY WRIT OF POSSESSION** Date: May 24, 2023 Time: 9:30 a.m. Dept: 86 Complaint Filed: April 7, 2023

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INTRODUCTION

City employees—public servants—should not have to suffer because of the City's inadvertent disclosure. Just as a client does not have to suffer from an attorney's inadvertent disclosure of attorney-client privileged material, undercover LAPD officers should not have to face harassment and the constant threat of being recognized—on or off the job—because their photos did not lose their exempt status under the CPRA when the City inadvertently produced them to Defendant Camacho. Nor did they lose their exempt status when Camacho further distributed them to Defendant SLSC and others. The City has taken great care to ensure its requested relief is narrow and tailored to its compelling interests of officer and public safety while still being sensitive to Defendants' First Amendment rights. The City is not seeking civil or criminal penalties; it just wants its inadvertently produced property back.

As discussed below, granting such relief would not constitute a "prior restraint" under the First Amendment even if the Defendants lawfully acquired and possess *some* of the images under the CPRA. Any First Amendment claim to access or publish photographs of sworn peace officers is negligible at best—these are rank and file officers who are not command staff, do not set policy for the Department, and have not otherwise voluntarily made themselves public figures—and in any event is outweighed by the City's interests. The City's narrowly tailored request for return of its property furthers multiple compelling and overriding City interests, including in the safety of its officers, in maintaining the ability to conduct undercover operations with existing or new undercover officers, and in protecting its interests in the photographs of its employees. The release of the undercover officers' photographs risks harm to those officers and public safety, and the City's inadvertent production does not waive the City's ability to prevent the publication or dissemination of those exempt records. The First Amendment does not render the City or this Court powerless to rectify the error or ameliorate continuing harm from publication or republication.

RELEVANT FACTS

On October 11, 2021, defendant Camacho made a request under the California Public Records Act, Gov. Code § 7920.000 *et seq*. ("CPRA"), to LAPD, Request No. 21-8914, which sought "[T]he most up-to-date roster of LAPD names, badge numbers, serial numbers, division, sworn status. The department headshot photos of all of the same officers referenced above." See Decl. of Defendant Ben

Camacho filed ISO Special Motion to Strike ("Camacho Decl.") at ¶ 6.[1] On January 25, 2022, LAPD responded to Camacho's CPRA request. LAPD produced certain documents, including a roster containing names and other requested information, but denied the request for photographs of officers. Compl. ¶ 9; Camacho Decl. ¶ 9. On May 27, 2022, Camacho filed a Petition for Writ of Mandate or in the Alternative a Complaint for Declaratory and Injunctive Relief against the City relating to the City's CPRA response, *Ben Camacho v. City of Los Angeles*, Case No. 22STCP02029. Camacho Decl. ¶ 10.

The City and Camacho subsequently agreed to settle the dispute pursuant to the settlement agreement. See Camacho Decl. ¶ 12, Ex. A ("Settlement Agreement"). In connection with the Settlement Agreement, the City provided photographs taken by the City of all full-time, active duty, sworn officers as of July 3, 2022 that were available in LAPD's system, except for officers working in an undercover capacity. Collins Decl. ¶ 2, Ex. 1. As acknowledged in the Settlement Agreement, the City was not required to produce records that are exempt under the CPRA, including photographs of officers assigned to undercover duties. See *id.* Undercover officers work in a capacity where their identity as a law enforcement officer is concealed. Tippet Decl. ¶ 7. These officers generally dress and act in a manner to assimilate into the community and environment that they are attempting to infiltrate. *Id.* Undercover operations include vice officers posing as prostitutes, officers posing as controlled substance or firearms purchasers, or officers posing as members of the public to conduct surveillance for the purposes of gathering evidence to support criminal investigations. *Id.* Camacho's counsel expressly agreed that the production of photographs in accordance with the Settlement Agreement would exclude images of officers working in undercover capacities. Collins Decl. ¶ 4, Ex. 2.

On September 16, 2022, a flash drive containing over 9,300 digital file images of officer photographs was produced to Camacho's counsel. Camacho Decl. ¶ 13; Collins Decl. ¶ 5. The City's cover letter enclosing the photos expressly stated "[a]s discussed and agreed upon by all counsel, images of officers working in an undercover capacity as of the time the pictures were downloaded (end of July 2022) are not included." Collins Decl. ¶ 4, Ex. 2; Camacho Decl. ¶ 13, Ex. B. Unbeknownst to the City, the flash drive provided on September 16, 2022 inadvertently included exempt records containing

[1] The Camacho Declaration filed in support of Defendant's Special Motion to Strike is attached as Exhibit 3 to the Sproule Declaration and is also available in the Court's files in this action.

images of officers working in an undercover capacity. Collin Decl. ¶¶ 5-7; Tippet Decl. ¶ 11.

Defendant Camacho subsequently provided Defendant SLSC with the records contained on the flash drive. Camacho Decl. ¶ 15. On March 17, 2023, SLSC then transferred the photographs, including exempt record photos of undercover officers, onto its "Watch the Watcher" website. Camacho Decl. ¶ 15; Tippet Decl. ¶¶ 11; Doe-1 Decl. ¶ 4. At that time, the City discovered that the flash drive inadvertently disclosed photos of undercover officers. Compl. ¶ 15. On March 20, 2023, Camacho also transferred the records obtained on the flash drive. Camacho Decl. ¶ 17. Websites have put literal bounties on officers' heads following the dissemination of the photographs on the SLSC's "Watch the Watchers" website. Tippet Decl. ¶ 18. One such website named "killercop.com" posted a tweet under the handle @KillerCop1984 saying "Remember, #Rewards are double all year for #detectives and #female cops." *Id*. ¶ 18, Ex. 7. The tweet included an image of a financial reward for the killing of an LAPD officer while another tweet included a link to the database of the officer photos at issue in this lawsuit, along with the caption "Clean head-shots on these #LAPD officers A to Z." *Id*. ¶ 19.

Defendants' possession of undercover officers' identifying information and photographs, including on Defendants' website Watch the Watchers, subjects these officers and their families to potential threats and danger, and harms the efficacy of LAPD's undercover operations that require anonymity. See Tippet Decl. ¶¶ 7-23; Doe-1 Decl. ¶¶ 2-7. Pursuant to Government Code § 6204.2, the City issued written demands to both Defendants for return of these government records. Sproule Decl. ¶¶ 2-3, Exs. 1 and 2; Camacho Decl. ¶ 18, Ex. C. Defendants have refused to return the records. Sproule Decl. ¶ 4. Defendants continue to possess undercover officer photographs, including on the Watch the Watchers website. [2] Camacho Decl. ¶¶ 15-17; Tippet Decl. ¶ 11.

[2] The City reserves all of its rights, title and interests in and to the images and photographs, including to bring an action to protect its material under U.S. Copyright law. The City has not consented and objects to the publication, copying, distribution, dissemination, or transfer of the photographs, individually or collectively, by Defendants or anyone else. The publication and dissemination of the photographs and images of LAPD officers violates the City's copyright interests therein, which interests serve as a separate basis for the relief requested albeit one that may be adjudicated in federal court.

ARGUMENT

I. THE FIRST AMENDMENT ALLOWS GRANTING THE WRIT OF POSSESSION

A. Because the Photographs Were Already Published, There Is No Prior Restraint.

The First Amendment affords "special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a 'previous' or 'prior' restraint on speech." (*Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 556.) The California Supreme Court expounded at length on the First Amendment's purpose of prohibiting against prior restraints, explaining that "'it was undoubtedly intended to prevent government's imposition of any system of prior restraints similar to the English licensing system under which nothing could be printed without the approval of the state or church authorities.'" (*Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1149, quoting Tribe, American Constitutional Law (2d ed.1988) § 12-34, p. 1039.) Based on this background of a prior restraint—the prohibition of publication of information in advance of its publication—the Court rejected a challenge to an injunction prohibiting the petitioner from repeating a defamatory statement: "Prohibiting a person from making a statement or publishing a writing *before* that statement is spoken or the writing is published is far different from prohibiting a defendant from *repeating* a statement or *republishing* a writing that has been determined at trial to be defamatory and, thus, unlawful. This distinction is hardly novel." (*Balboa Island Village Inn, Inc.*, 40 Cal.4th at pp. 1149-50; see also *DVD Copy Control Ass'n., Inc. v. Bunner* ["*DVD Copy*"] (2003) 31 Cal.4th 864, 886-887 [injunction issued in response to unlawful conduct is not a prior restraint].) This jurisprudence is in accord with the United States Supreme Court: "The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' [Citation.]." (*Alexander v. United States* (1993) 509 U.S. 544, 550 [forfeiture order depriving plaintiff of specific assets found to be related to his previous racketeering violations not a prior restraint]; see also *Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 559 ["[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."]; *Twitter, Inc. v. Garland* (9th Cir. 2023) 61 F.4th 686, 702-702 ["In First Amendment law, a prior restraint is an order 'forbidding certain communications when issued in advance of the time that such communications are to occur.'"].)

Under this standard, granting the City's requested relief would not constitute a prior restraint as the photographs at issue have already been published. (*Nebraska Press Ass'n*, 427 U.S. at p. 572 ["The question presented in this case is whether, consistently with the First Amendment, a court may enjoin the press, *in advance of publication*, from reporting or commenting on information acquired from public court proceedings, public court records, or other sources pending judicial proceedings."] [emphasis added] [Brennan, J., concurring]; *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545, 556 ["A 'prior restraint,' for First Amendment purposes, is a governmental action '*forbidding* certain communications when issued in advance of the time that such communications are to occur.'"]

Further, the City seeks an order for return of its property only *after* this Court determines that the City is entitled to possession of its property. (See Code Civ. Proc. ("C.C.P.") § 512.010(b); see also C.C.P. § 512.060 [writ of possession may issue only after plaintiff establishes probable validity of claim to possession of the property].) This situation is therefore analogous to cases where the judicial order follows a substantive finding on the underlying issue. (See, e.g., *Balboa Island Village Inn, Inc.*, 40 Cal.4th at pp. 1155-1156 ["Accordingly, we hold that, following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory."]; *DVD Copy*, 31 Cal.4th at p. 888 ["DVD CCA alleged and established that Bunner misappropriated its trade secrets in violation of California law."]; *Alexander*, 509 U.S. at p. 552 ["Here, by contrast, the seizure was not premature, because the Government established beyond a reasonable doubt the basis for the forfeiture."]; see also *Twitter, Inc.*, 61 F.4th at p. 707 ["[G]overnment restrictions on the disclosure of information transmitted confidentially as part of a legitimate government process . . . do not pose the same dangers to speech rights as do traditional censorship regimes."].)

That the photographs have been published and that the City seeks return of the photographs only after this Court determines its right to possession is what distinguishes this case from *Association of L.A. Deputy Sheriffs v. L.A. Times Commission's LLC* (2015) 239 Cal.App.4th 808. There, the Association sought an injunction preventing publication of the subject information (which did not involve unmasking undercover officers). (*Id*. at p. 811 ["[T]he union representing deputy sheriffs in the Los Angeles County Sheriff's Department sued to enjoin the *Los Angeles Times* from publishing news

reports about the department's hiring of officers who used to work for the county's office of public safety."].) Further, in that case, the court noted that, "[i]f and when the Times publishes any article that constitutes actionable libel or invasion of privacy about any individual deputy, that deputy remains free to file any lawsuit he or she can plead and prove in good faith." (*Id*. at p. 577.) This case is much more analogous to that hypothetical situation, further demonstrating there is no prior restraint at issue here.

Therefore, because the City's requested relief here would not constitute a "prior restraint," there is no need to conduct the analysis under *Nebraska Press Association* to determine the propriety of a prior restraint. (See *Nebraska Press Ass'n*, 427 U.S. at pp. 562-570.) Rather, as discussed below, this Court may order return of the City's property because the request is narrowly tailored to achieve the City's compelling interest. Indeed, even if, in the end, a *Nebraska Press Association* analysis is conducted, the Court can and should order the Defendants to return the City's property. (See I.E., *infra*.)

B. Defendants Have No First Amendment Right to the Photographs.

Initially demonstrating that the Court may order the return of the City's property is that Defendants had no First Amendment right to the photographs in the first place. "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally." (*Houchins v. KQED, Inc.* (1978) 438 U.S. 1, 16 [Stewart, J., concurring]; see also *L.A. Police Dep't v. United Reporting Pub. Corp.* (1999) 528 U.S. 32, 40 ["California could decide not to give out arrestee information at all without violating the First Amendment."]; *Branzburg v. Hayes* (1972) 408 U.S. 665, 684 ["It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."].). The California Supreme Court has specifically rejected a claim that the First Amendment compels disclosure of a peace officer's identifying information, *Copley Press, Inc. v. Sup. Ct.* (2006) 39 Cal.4th 1272, 1299-1305, and has recognized the importance of *nondisclosure* in this precise situation: "Of course, if it is essential to protect an officer's anonymity for safety reasons or for reasons peculiar to the officer's duties—as, for example, in the case of an undercover officer—then the public interest in disclosure of the officer's name may need to give way." (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66; see also *Comm'n on Peace Officer Standards & Training v. Sup.*

Ct. ("POST") (2007) 42 Cal.4th 278, 301 ["We readily acknowledge that throughout the state there are some officers working in agencies who, because of their particular responsibilities, require anonymity in order to perform their duties effectively or to protect their own safety."].)

Even more on point is a federal court decision concluding the First Amendment did not prevent Washington State from exempting certain types of photographs from a public records request disclosure: "There is no First Amendment right to access governmental records. The PRA's exemption of certain photographs from disclosure does not implicate the First Amendment." (*Cortland v. Pierce Cnty.* (W.D. Wash. 2020) 488 F.Supp.3d 1027, 1033; see also *Boardman v. Inslee* (W.D. Wash. 2019) 354 F.Supp.3d 1232, 1237-1238, 1241-1244 [state initiative prohibiting the release of public employee identifying information did not violate the First Amendment], aff'd by 978 F.3d 1092 (9th Cir. 2020).)

Therefore, Defendants had no First Amendment right to the photographs. The question, therefore, is whether the First Amendment mandates Defendants be able to retain the photographs because they were inadvertently produced. It does not.

C. <u>The First Amendment Does Not Preclude Ordering the Return of the Photographs.</u>

At bottom, the City is requesting return of its property, which may or may not have an incidental impact on Defendants' speech. (See *R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 191 ["Neither the First Amendment to the United States Constitution nor article I, section 2 of the California Constitution prohibits courts from incidentally enjoining speech in order to protect a legitimate property right."].) While an order having an incidental impact on Defendants' speech is not prohibited by the First Amendment, it would still be subject to First Amendment scrutiny as a content neutral restriction. (*DVD Copy*, 31 Cal.4th at pp. 877-878 ["[T]he trial court issued the injunction to protect DVD CCA's statutorily created property interest in information—and not to suppress the content of Bunner's communications. Because the injunction is justified without reference to the content of Bunner's communications, it is content neutral."].) Further, that such an order would "identif[y] the prohibited speech by its content does not make it content based." (*Id*. at p. 878.)

Because the requested relief is content neutral, an order granting this request would not violate the First Amendment if it "burden[s] no more speech than necessary to serve a significant government interest." (*Madsen v. Women's Health Ctr., Inc.* (1994) 512 U.S. 753, 765.) This analysis requires a

balance between the governmental interest and the magnitude of the speech restriction. (*DVD Copy*, 31 Cal.4th at p. 880.) Here, the City's request for return of the photographs of its undercover officers not only meets this standard, but it meets the more exacting strict scrutiny standard as the request is narrowly tailored to serve a compelling government interest, specifically, the safety of its undercover police officers and their families and the safety of the people of Los Angeles and the United States. (See *Reed v. Town of Gilbert* (2015) 576 U.S. 155, 163 [content-based restrictions justified if narrowly tailored to serve compelling interests].)

The City's request is narrowly tailored because it seeks return of the production of the inadvertently produced images of undercover officers exempt under the CPRA and Defendants' destruction of electronic copies of such records, to then be replaced with an alternative production of photos. In the alternative, the Court can order the return and destruction of photos of all officers below command staff (i.e. captain) level. While the City seeks the return of only the inadvertently produced photos of undercover officers, the Court cannot order the claw-back of only the undercover officers' photos as such an order would cause more harms by further identifying those officers within the dataset. To the extent that the Court requests additional information regarding the number or percentage of exempt images, the City will submit to the Court conducting an *ex parte in camera* review. (See *Twitter, Inc.*, 61 F.4th at p. 700 ["[W]e may review the classified materials *ex parte* and *in camera.*"]; but see *id*. at p. 698 [strict scrutiny does not require the restriction be perfectly tailored].)

D. Granting the City's Requested Relief Is Necessary to Mitigate Harm to the Undercover Officers, Their Families, and Security of the City and the United States.

A number of compelling interests support the City's request for return of the photographs. First, the City has a compelling interest in protecting undercover officers and their families. (See *Ibarra v. Sup. Ct.* (2013) 217 Cal.App.4th 695, 705 [implying that a peace officer whose duties require anonymity has a substantial interest in maintaining the confidentiality of his identity].) As the Tippet Declaration explains, the safety of these officers and their families is at risk. Tippet Decl., ¶¶ 12-14. It is not unprecedented for revealed undercover officers to become the targets of violence. Tippet Decl., ¶ 13. This fear is not theoretical; these officers are dealing with it right now. Tippet Decl., ¶ 14. At least one officer has chosen to retire to protect himself and his family. Tippet Decl., ¶ 22. The First Amendment

does not render the City and this Court powerless to protect these officers and their families.

Second, the City's request for return of the photographs furthers the compelling interest of public safety not just for the City but for the United States. (See *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 171 [public safety is a compelling interest]; *U.S. v. Doe* (2nd Cir. 1995) 63 F.3d 121, 128 ["Compelling interests may include . . . the integrity of significant [government] activities entitled to confidentiality, such as ongoing undercover investigations or detection devices."] [internal quotation marks omitted].) These undercover officers are embedded in a number of capacities, such as surveillance of violent assault and robbery suspects as well as suspected murderers, kidnappers, and sex offenders. Tippet Decl., ¶ 9. These officers are also utilized in "significant cases that require close contact with a suspect, such as murder investigations and the collection of DNA evidence from suspects, where exposure could not only prevent LAPD from solving the case but allow the suspect to kill again; kidnapping cases, where exposure could threaten the lives of victims and officers alike; hardcore gang cases, where exposure could jeopardize the ability to stop a host of other crimes, including murder, robbery, and drug trafficking; public events, where exposure could threaten the lives of both speakers and spectators; investigations into foreign and domestic terrorists; and murder-for-hire investigations." Tippet Decl., ¶ 14. Defendant's continued possession of these undercover officer photographs at the very least substantially impinges on the ability of these officers to conduct these tasks, rendering everyone less safe. Further, these undercover officers assist other agencies, including federal task forces, therefore risking national security. Tippet Decl., ¶¶ 8, 23. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." (*Haig v. Agee* (1981) 453 U.S. 280, 307; see also *In re Nat'l Sec. Letter* (9th Cir. 2022) 33 F.4th 1058, 1072 ["[K]eeping sensitive information confidential in order to protect national security is a compelling government interest."].) Unfortunately, because of the exacting "requirements and expectations" of undercover units, these officers are not easily replaceable. Tippet Decl., ¶ 10.

Third, the City has a compelling interest in maintaining its officer staffing levels, and the publication of these photos hinders that. Tippet Decl., ¶ 20. In fact, Mayor Bass has recently stated a goal of substantially increasing the police department's staffing, which has fallen by approximately 1,000 officers over just the last four years. (Chiriguayo, *LAPD is Hemorrhaging Officers. Can It Retain*

and Hire More?, KCRW (Apr. 19, 2023), available at https://www.kcrw.com/news/shows/press-play-with-madeleine-brand/dominion-gop-police-drinking-ocean-trash/bass-lapd.) With lower staffing levels, the police department will have fewer resources available to respond to criminal conduct. (See City News Service, *LAPD Is Not Meeting Its Staffing Goals: Agency Is Underemployed By 176 Officers, Chief Says*, ABC7 (Aug. 24, 2022) ["[R]esponse times for urgent and routine calls have 'lengthened significantly' as a result of the staffing shortage."], available at https://abc7.com/lapd-underemployed-officers-staffing-goals/12161466/; see *Listecki v. Official Comm. of Unsecured Creditors* (7th Cir. 2015) 780 F.3d 731, 745 [compelling interests in national security and public safety].)

Therefore, multiple compelling interests support return of the photographs. Issuance of relief by this Court is the only remedy available to mitigate the harm from this unfortunate situation, and the Court may do so without violating Defendants' First Amendment rights.

E. A Prior Restraint Would Not Violate the First Amendment.

Prior restraints on speech are subject to the strict scrutiny standard of review. (*In re Dan Farr Prods.* (9th Cir. 2017) 874 F.3d 590, 503, fn. 2; see also *Levine v. U.S. District Court* (9th Cir. 1985) 764 F.2d 590, 595 ["[T]he district court's [prior restraint] may be upheld only if the government establishes that: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, [citations]; (2) the order is narrowly drawn, [citations]; and (3) less restrictive alternatives are not available."].) Therefore, because the requested relief satisfies the strict scrutiny standard, any prior restraint would not violate the First Amendment. (See *People v. Bryant* (Colo. 2004) 94 P.3d 624, 633-639 [issuing prior restraint to prevent the publication of inadvertently disclosed information].)

This result is in accord with the *Nebraska Press Ass'n* considerations: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." (*Nebraska Press Ass'n*, 427 U.S. at p. 562.) First, there has been (fortunately) limited publicity of the actual identities of the undercover officers; rather, the publicity has focused on the inadvertent disclosure itself. Second, the City is unaware of other measures that could mitigate the harm caused by the publication of the undercover officers' photographs. This is not like the pretrial

order in *Nebraska Press Ass'n* where the harm could be mitigated by a change in venue, postponement of the trial, voir dire, jury instructions, or sequestering the jury. (See *id*. at pp. 563-564.) Third, while ordering the return of the photographs may not be a panacea, it is likely to make the photographs more difficult to find on the Internet, and therefore would mitigate harm.

Defendants may argue the return of the photographs would have a limited benefit or effect because they have already been published, but ordering return of the photographs would make the photographs more difficult to find, which may prevent someone with malicious intentions from finding them, and may, in turn, save one life. (See *Doe No 1 v. United States* (Ct. Fed. Cl. 2019) 143 Fed.Cl. 238, 241 ["[T]he Government's 'cat is out of the bag' argument fails because the fact that Plaintiffs have not been harassed or attacked yet does not imply that anonymizing their names now has no value. Further, disclosure on social media by one or more Plaintiffs cannot waive the privacy interest arguments of every Plaintiff in the case."].)

II. THE CITY MEETS THE REQUIREMENTS FOR A WRIT OF POSSESSION.

"A writ of possession shall issue if both of the following are found: (1) the plaintiff has established the probable validity of the plaintiff's claim to possession of the property; and (2) the undertaking requirements of Section 515.010 are satisfied." (C.C.P. § 512.060(a).)[3] "A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." (C.C.P. § 511.090.) As discussed below, the City meets the statutory requirements for a writ of possession.

A. The City Established the Probably Validity of Its Claim That the City Is Entitled to Recover Possession of the Inadvertently Produced Records Exempt Under the CPRA.

To obtain a writ of possession, the City must show that it has the right to immediate possession of the property and that the property is wrongfully detained by defendants. (C.C.P. § 512.010(b); see *also* Civil Code § 3379 ["person entitled to the immediate possession of specific personal property may recover the same in the manner provided by the [C.C.P.]"); Civil Code § 3380 ["person having the possession or control of a particular article of personal property, of which he is not the owner, may be

[3] The City is exempt from the undertaking requirement in § 515.010. (C.C.P. § 995.220(b); *City of South San Francisco v. Cypress Lawn Cemetery Ass'n* (1992) 11 Cal.App.4th 916, 921-22.)

compelled to specifically deliver it to the person entitled to its immediate possession."].) A claim for possession of personal property is an action in claim and delivery or replevin. (*Steel v. Marlborough Hall Corp.* (1929) 100 Cal.App. 491, 494.) California's procedures are provided under C.C.P. §§ 511.010 through 516.050. (*Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.5th 1279, 1285; see *also Waffer Int'l Corp. v. Khorsandi* (1999) 82 Cal.App.4th 1261, 1271 ["Claim and delivery is a remedy by which a party with a superior right to a specific item of personal property … may record possession of that specific property before judgment."].)

The City's writ of possession seeks the return of the exempt records inadvertently disclosed—specifically photographs of officers working in an undercover capacity— and destruction of all electronic and physical copies of photographs obtained from that production. LAPD department photographs are public records as defined in Government Code § 7920.530 and, as discussed below, photographs and images of officers assigned to undercover duties are exempt from disclosure pursuant to Government Code § 7920.000. As such, Defendants are not authorized to possess the records of the photographs of officers assigned to undercover duties that were inadvertently disclosed by the City.

There is no dispute that the photographs of officers assigned to undercover duties are exempt from disclosure under the CPRA and California law. (See Gov. Code §§ 7922.000; 7927.700.)

In *POST*, the California Supreme Court found:

> We readily acknowledge that throughout the state there are some officers working in agencies who, because of their particular responsibilities, require anonymity in order to perform their duties effectively to protect their own safety….***If the duties of a particular officer, such as one who is operating undercover, demand anonymity, the need to protect the officer's safety and effectiveness would certainly justify the Commission in withholding information identifying him or her*** under Government Code section 6255, subdivision (a), which permits records to be withheld if on the facts of a particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. ***The public has a strong interest in maintaining the safety and efficacy of its law enforcement agencies.***

(*POST*, 42 Cal.4th at p. 301 [internal citations and quotations omitted; emphasis added].)

California courts have consistently recognized this well-established exemption for officers working undercover or in positions whose duties require anonymity. (See *Long Beach Police Officers Ass'n*, 59 Cal.4th at p. 74 ["Of course, if it is essential to protect an officer's anonymity for safety reasons or for reasons peculiar to the officer's duties—as, for example, in the case of an undercover

officer—then the public interest in disclosure of the officer's name may need to give way."]; *Int'l Fed'n of Prof. & Tech. Engineers*, 42 Cal.4th at p. 337 ["If an officer's anonymity is essential to his or her safety, the need to protect the officer would outweigh the public interest in disclosure and would justify withholding the officer's name."]; *Ibarra*, 217 Cal.App.4th at p. 703 [noting "exception for circumstances where 'the duties of a particular officer, such as one who is operating undercover, demand anonymity.'"] [quoting *POST*, 42 Cal.4th at p. 301].)

The City informed defendant Camacho of its intent to withhold exempt records containing images of LAPD officers working in undercover assignments from the City's production in response to Camacho's CPRA writ petition. Collins Decl. ¶¶ 2, Ex. 1. The Settlement Agreement similarly confirmed the City would not produce exempt records—such as photos of undercover officers. Collins Decl. ¶ 2, Ex. 1. Camacho did not object to the withholding of these exempt records. See *id.* Moreover, the City's letter transmitting the flash drive containing images to Camacho's counsel expressly stated "[a]s discussed and agreed upon by all counsel, images of officers working in an undercover capacity as of the time the pictures were downloaded (end of July 2022) are not included." *Id.* ¶ 4, Ex. 2. Despite this agreement, the City inadvertently disclosed images of undercover officers. See *id.* ¶¶ 5-7.

Pursuant to Government Code § 6204.2, the City issued written demands to both Defendants for return of these government records. Sproule Decl. ¶¶ 2-3, Exs. 1 and 2. Defendants did not respond to these demands within the 20-day statutory deadline by returning the records or demonstrating that the records do not belong to the LAPD. According to the statute, the Court should find that "the specified record is in the possession of a person, organization, or institution not authorized to possess the record," and therefore order that the records be delivered to the LAPD. (See Gov. Code § 6204.1(c)-(d).)

The City's claim for return of personal property through a writ of possession is an appropriate vehicle for seeking return of the City's exempt records. (See *Pillsbury, Madison & Sutro*, 55 Cal.App.4th at pp. 1285-1289 [granting injunction for return of documents wrongfully possessed by the defendant under C.C.P. § 512.070]; see also *In re IBP Business Documents Litig.* (8th Cir. 1985) 754 F.2d 787, 789 [confirming that an action for replevin was appropriate to compel delivery of documents]; *United States v. Navarro* (D.D.C. Mar. 9, 2023) No. 22-2292 (CKK), 2023 WL 2424625 at *10-11 [District of Columbia's replevin statute provides a cause of action for government to seek return of

documents unlawfully retained under the Presidential Records Act, 44 U.S.C. §§ 2201-2209].)

The City's inadvertent production of records exempt from disclosure does not waive the exemption. (See *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1183.) In *Ardon*, the California Supreme Court found "it is doubtful the Legislature intended to enact a statutory scheme that would prevent government agencies from minimizing the damage caused by the inadvertent disclosure of private and confidential information. Nor is it likely the Legislature intended to adopt a rule that inadvertent disclosure requires confidential information to be made generally available to the public." (*Id.*; *Rocky Mountain Wild Inc. v. United States Forest Serv.* (10th Cir. 2022) 56 F.4th 913, 930-931 [government's inadvertent disclosure of exempt records, and third party's subsequent dissemination of exempt records, does not erase their exempt status or preclude their claw-back].)

The Tenth Circuit's analysis in *Rocky Mountain* of the inadvertent disclosure of exempt records and subsequent claw-back under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), is instructive. (See *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338 [because the CPRA was modeled on FOIA, judicial constructions of FOIA "serve to illuminate the interpretation of its California counterpart"].) In *Rocky Mountain*, the U.S. Forest Service inadvertently disclosed exempt documents under FOIA and sought an order for the return or destruction of the exempt documents. (*Rocky Mountain*, 56 F.4th at p. 930.) The plaintiff record requestor argued that the documents were no longer confidential because another organization posted them online and thus the district court could not order their return. (*Id.*) The Tenth Circuit rejected this argument for several reasons. (*Id.*)

First, the court distinguished between an intentional and inadvertent disclosure. (*Id.*) "It is one thing to afford no confidentiality to a journal containing information purposefully made public, but it is quite another to afford no confidentiality to documents mistakenly disclosed and then made public after Plaintiff shared those documents with another organization to disseminate." (*Id.*) ***Second***, the court found that the Forest Service inadvertently turned over documents that the plaintiff never had a right to possess under FOIA. (*Id.*) The issue was not who received the records, but "whether any member of the public had a right to receive them." (*Id.*) ***Third***, the court confirmed that the government only waived the ability to exempt a document under FOIA after an intentional – not inadvertent – disclosure to the public. (*Id.*) ***Fourth***, the court noted that there was no authority barring courts from ordering the return

or destruction of inadvertently disclosed records subject to FOIA exemptions. (*Id.* at p. 931.) For these reasons, the court affirmed the district court's claw-back order, finding that the public dissemination by a third party of inadvertently disclosed documents did not erase their exempt status. (*Id.*)

Here, the City inadvertently produced photographs of undercover officers, which are exempt under the CPRA and California law as discussed above. No member of the public had a right to receive the exempt photographs. For the same reasons identified by the Tenth Circuit, this Court can and should issue a claw-back order for the return of the records. (*Rocky Mountain*, 56 F.4th at p. 930.)

B. Defendants Continue to Wrongfully Possess the City's Exempt Records.

Camacho transferred to SLSC the records contained on the flash drive, including exempt records reflecting the images of undercover officers. Camacho Decl. ¶ 15; Tippet Decl. ¶ 11. SLSC transferred these same records onto its "Watch the Watchers" website. Camacho Decl. ¶ 16; Tippet Decl. ¶ 11. Camacho further transferred these records online. Camacho Decl. ¶ 17. The City issued written demands to Camacho and SLSC for return of the flash drive and the exempt records it contained that were inadvertently produced. Camacho Decl. ¶ 18, Ex. C; Sproule Decl. ¶¶ 2-3, Exs. 1-2. Defendants have refused to return the records. Sproule Decl. ¶ 4.

C. The Court Can Enter an Order for Transfer of Possession of the Records to the City.

C.C.P. § 512.070 states "[i]f a writ of possession is issued, the court may also issue an order directing the defendant to transfer possession of the property to the plaintiff. Such order shall contain a notice to the defendant that failure to turn over possession of such property to plaintiff may subject the defendants to being held in contempt of court." Such an order is proper here to return the City's photos. (See *Pillsbury, Madison & Sutro*, 55 Cal.App.5th at p. 1283.)

CONCLUSION

The City respectfully requests that the Court grant the writ of possession, order the return of the flash drive, and direct Defendants to confirm that all electronic copies have been destroyed.

DATED: May 2, 2023

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